190. In June 1997, Cablevision filed a petition for determination of effective competition in the six Connecticut cable communities that comprise its franchise.[639] In August of this year, SNET urged the Commission to deny Cablevision's petition, arguing that it was premature to deregulate an entire franchise area if only a portion of it is subject to head-to-head competition. In its petition, SNET explained that Cablevision serves six communities, but only offers a price discount in Fairfield City where SNET is currently providing competing cable services.[640] Cablevision subscribers in the other five communities are not being offered a discount. The Connecticut Department of Public Utility Control supports SNET's position.[641] The Commission is currently reviewing this petition.

3. Sterling Heights Area, Michigan

191. In 1996, Ameritech began to provide service in the Detroit suburbs of Sterling Heights (population 121,000), Fraser (population 14,000), Southgate (population 30,700) and Garden City (population 32,000).[642] Ameritech offered new subscribers 80 channels on its basic and expanded basic tiers, adding free channels such as the History Channel, ESPN2, PASS, the Golf Channel and the Disney Channel to the expanded basic tier at no additional cost.[643] In addition, it offered, for a limited time, free basic or expanded service for the first two months, free installation, and free premium channels including Showtime, The Movie Channel, Flix and Sundance Channel for two months.[644] According to Comcast, Ameritech has at least 1,500 subscribers in Garden City, 500 subscribers in Southgate, 150 subscribers in Fraser, and 100 subscribers in Sterling Heights.[645]

192. Following Ameritech's entry, Comcast, the incumbent cable operator, pledged to meet or beat any offer from another wired cable operator; offered HBO free for one year; guaranteed rates for one year and offered a $3 per month discount off the expanded basic rate; added up to 40 channels in some of its franchise areas; moved The Disney Channel and PASS (a regional sports programming channel) from premium service to the expanded basic tier; and introduced a new advanced converter box with

---

[639] *Cablevision Systems of Southern Connecticut, Fairfield, Bridgeport, Stratford, Orange, Woodbridge, Milford,* Petition for Special Relief, CSR 5031-E (June 13, 1997).

[640] *Cablevision Systems of Southern Connecticut, Fairfield, Bridgeport, Stratford, Orange, Woodbridge, Milford,* Petition for Determination of Effective Competition, SNET Opposition to Petition for Special Relief, CSR-5031-E (July 10, 1997) at 16-18.

[641] *Cablevision Systems of Southern Connecticut, Fairfield, Bridgeport, Stratford, Orange, Woodbridge, Milford, Petition for Determination of Effective Competition,* Opposition to Petition for Special Relief by the Connecticut Department of Public Utility Control, CSR-5031-E (July 22, 1997), at 2.

[642] *Comcast Cablevision of Sterling Heights, Inc., Comcast Cablevision of Taylor, Inc.*, Petition for Determination of Effective Competition ("Sterling Heights Petition"), March 25, 1997, at Exhibit E.

[643] Ameritech (news release) Sept. 18, 1996, at 1.

[644] Sterling Heights Petition, at 5 n. 14.

[645] *Id.* at 4.

Interactive Programming Guide capability.[646] In Garden City, for example, Comcast increased its expanded basic tier service from 47 to 66 channels and increased its tier price by only 91 cents, a decrease in the per channel rate of 12 cents. In Southgate, Comcast added 16 channels to its expanded basic tier and raised the monthly rate by 62 cents, a decrease in per channel rate of 10 cents. In Sterling Heights, Comcast currently offers eight more channels on its basic expanded tier and has reduced its rate by $1.20.[647]

193. Comcast's petition for determination of effective competition was granted in May 1997.[648] The Commission found that Ameritech has completely overbuilt Fraser, Southgate, and Garden City and is providing service in these areas.[649] Although Ameritech has not completed its overbuild in Sterling Heights, the Commission nevertheless found that Ameritech has activated plant and is providing service to subscribers in that area and that Ameritech has heavily marketed its services through local media and has initiated an extensive promotion campaign.[650]

4. Thousand Oaks, California

194. The City of Thousand Oaks, California (with 45,000 cable subscribers) awarded a cable franchise to GTE in February 1996. GTE began offering its new cable service in September 1996 at $10.95 for 28 channels.[651] GTE is competing with two incumbent cable operators that serve different parts of the city, Falcon and TCI.[652] Falcon, with 4,000 subscribers in the city, offers a $22.45 basic tier service which includes 38 channels. TCI, with 32,000 subscribers in the city, is the larger incumbent. It operates Ventura County Television, which serves the entire county of Ventura including the city of Thousand Oaks. TCI charges $10.51 for 21 channel basic tier service.[653]

195. Falcon, following GTE's entry, is now offering its subscribers an expanded satellite package of 12 channels for 45 cents instead of the original SatPac service of six channels for $6.36 and

[646]Ameritech Comments at 11.

[647]Ameritech Comments at 11; and Comments on Consumer Union Petition, Attachment 1.

[648]*Comcast Cablevision of Sterling Heights, Inc. and Comcast Cablevision of Taylor, Inc., Petition for Determination of Effective Competition*, CSR 4988-E, Memorandum Opinion and Order ("Sterling Heights Order"), 12 FCC Rcd 6815, 6818 ¶ 4 (1997).

[649]*Id.*

[650]*Id.* at ¶ 9.

[651]Miguel Bustillo, *Thousand Oaks Orders Falcon to Reduce Basic Cable Rates*, Los Angeles Times, Oct. 3, 1996, at B4.

[652]*Falcon Cablevision to Cut Rates for Several Premium Channels*, Los Angeles Times, Nov. 22, 1996, at B1

[653]*Id.*; Miguel Helft, *Battle For Cable High Ground Begins Underground*, Los Angeles Times, Aug. 20, 1996, at B1.

has cut its prices in half for premium channels (from $9.95 to $5 each).[654] TCI, on the other hand, seems to be positioning itself to compete with GTE for new services such as "interactive television." The new service would allow viewers to customize a program. For example, while watching Prime Sports, the viewer can request game statistics, watch interviews with players, or follow a star player throughout the game.[655]

196. Falcon Cablevision's petition for determination of effective competition was granted by the Commission in April 1997.[656] The Commission noted that the entire franchise area will be overbuilt by GTE, which has a ten year franchise with Thousand Oaks, and that Falcon has lowered prices and added new channels.[657] According to GTE, it now has more than 1,000 subscribers and more are being added every day.[658]

5. *St. Petersburg and Pinellas County, Florida*

197. The entry by GTE into Clearwater in June 1996 and the Commission's subsequent finding of effective competition in Clearwater was discussed in the *1996 Report*.[659] While Clearwater is GTE's first cable franchise in Pinellas County, Florida, it obtained a second franchise to serve the City of St. Petersburg[660] in August 1996 and a third franchise to serve the unincorporated areas of Pinellas County in September 1996.[661]

198. In the City of St. Petersburg, GTE offers 78 channels of programming compared to 82 channels offered by Time Warner, the incumbent cable operator.[662] GTE's 23 channel basic service is priced at $10.95 and its 60 channel basic plus enhanced basic service is $25.95.[663] These two services and

---

[654] *Id.*

[655] Miguel Helft, *Battle For Cable High Ground Begins Underground; Telecommunications Giants Argue Over Cut Lines, Wage High-Tech War for TV Viewers*, Los Angeles Times, Aug. 20, 1996, at B1.

[656] *Falcon Cablevision, Petition for Determination of Effective Competition*, CSR 4955-E, Memorandum Opinion and Order, DA 97-861 ¶ 11 (Apr. 24, 1997), at 5.

[657] *Id.* at 4-5.

[658] Falcon Cablevision for Determination of Effective Competition, Petition for Special Relief, CSR 4955-E (March 5, 1997), at 6 n. 22.

[659] *1996 Report*, 12 FCC Rcd at 4457-58 ¶¶ 218-20.

[660] *Paragon Communications d/b/a Time Warner Communications, For Determination of Effective Competition*, St. Petersburg Petition for Special Relief ("St. Petersburg Petition"), CSR 4930-E (January 15, 1997), at 7.

[661] *Id.* at Exhibit E.

[662] *Id.* at 9 and Exhibits E and F.

[663] *Id.* at Exhibit E; and Waveney Ann Moore, *Cable War Expands to St. Petersburg*, St. Petersburg Times, Jan. 5, 1997, at 12.

rates are very similar to those offered by GTE when it entered Clearwater. In addition, GTE offers St. Petersburg customers free basic service for two months, an interactive service that includes financial, educational, sports, news, games and travel services at $10.95 (free to subscribers of premium services), a cable modem service at $28.95 to GTE cable subscribers,[664] a 45 day risk free guarantee (whereby GTE will pay the costs of switching the customer back to its old cable operator if not satisfied with GTE's service), free installation (up to two television sets), and an interactive program guide and free remote control.[665] By January 1997, GTE was offering its services to about 800 homes and was undertaking substantial construction in the northern sections of the city.[666]

199. In Pinellas County, GTE's service offerings are very similar to those offered in St. Petersburg and Clearwater. The basic 23 channel service is $10.95 and the 62 channel basic plus expanded basic service is $25.95. In addition, GTE offers expanded service customers the same risk free guarantee, and free electronic programming guide, video center and remote control that it offers its customers in St. Petersburg and Clearwater.[667]

200. According to Time Warner, its response in the St. Petersburg market (with approximately 71,000 subscribers) is similar to its competitive response to GTE's entry in the Clearwater market.[668] Time Warner has upgraded its plant and moved the Disney Channel to its expanded basic package at no additional cost. Time Warner states that its cable prices are the same or less than GTE's and that it offers more channels than GTE. For example, Time Warner offers 64 channels on its basic plus expanded basic service compared to GTE's 60 channel service.[669] Further, Time Warner believes that GTE's innovative services (such as GTE's interactive service) are not very successful.[670] Throughout Pinellas County, Time Warner is monitoring the success of its rivals.[671]

201. Both of Time Warner's petitions for determination of effective competition in St. Petersburg and in the unincorporated areas of Pinellas County were granted by the Commission in March

---

[664]Moore, *Cable War Expands to St. Petersburg*, at 12. The cable modem rents for an additional $14.95 per month.

[665]St. Petersburg Petition, Exhibit E.

[666]Waveney Ann Moore, *Cable War Expands to St. Petersburg*, St. Petersburg Times, Jan. 5, 1997, at 1.

[667]*Time Warner Entertainment-Advance/Newhouse Partnership and Paragon Communications both d/b/a Time Warner Communications, For Determination of Effective Competition*, Petition for Special Relief, CSR 4850-E (October 9, 1996), Exhibits F and G.

[668]St. Petersburg Petition at 9-10.

[669]Id. at Exhibit F. Time Warner did not provide any information on its rates for basic or expanded basic services.

[670]Moore, *Cable War Expands to St. Petersburg*, at 12.

[671]*Id.* at 12.

1997.[672] The Commission found that GTE was currently offering service in St. Petersburg and that its ten year franchise agreement appears to provide that GTE will construct its system throughout St. Petersburg.[673] The Commission also found that Time Warner's loss of subscribers to GTE is further evidence of competition in the city.[674] In Pinellas County, the Commission found that GTE's current service area covered about 15% of the County, with construction to be completed within three years. It also found that Time Warner's loss of subscribers to GTE was persuasive evidence that competition was present in the County.[675]

6. Wayne, Michigan

202. The City of Wayne awarded a cable franchise to Ameritech in March 1996.[676] Ameritech offered 80 channels on its basic and expanded basic tiers and included channels such as the History Channel, ESPN2, the Golf Channel and the Disney Channel at no additional cost. Its basic and expanded basic rates were $9.95 and $23.95, respectively.[677] However, Ameritech offered free basic and expanded basic services for the first two months, free installation, and free Showtime, The Movie Channel, Flix and Sundance Channel for two months. Time Warner, the incumbent provider, offered a total of 60 channels on its basic and expanded basic service tiers.[678] The rates were $11.26 and $20.90 for basic and expanded basic services, respectively.[679]

---

[672] *Paragon Communications d/b/a Time Warner Communications, Petition for Determination of Effective Competition*, CSR 4921-E, Memorandum Opinion and Order ("St. Petersburg Order"), DA 97-566 ¶ 13 (rel. Mar. 18, 1997); and *Time Warner Entertainment-Advance/Newhouse Partnership and Paragon Communication, Petition for Determination of Effective Competition*, CSR 4850-E, Memorandum Opinion and Order ("Pinellas County Order"), 12 FCC Rcd 3143, 3149 ¶ 12 (1997).

[673] St. Petersburg Order ¶ 11.

[674] St. Petersburg Order at 6. Time Warner submitted an affidavit by Robert J. Barlow stating that several Time Warner subscribers stated that they switched to GTE's cable service. *See Time Warner Entertainment-Advance/Newhouse Partnership and Paragon Communication, Petition for Determination of Effective Competition*, CSR 4850-E, Petition for Special Relief, ("Pinellas County Petition"), CSR 4850-E (October 9, 1996), Exhibit D.

[675] Pinellas County Order at 3147-48 ¶¶ 10-11.

[676] *Time Warner Entertainment-Advance/Newhouse Partnership and Paragon Communications both d/b/a Time Warner Cable, Petition for Determination of Effective Competition*, CSR 4935-E, Memorandum and Opinion Order ("Wayne Order"), 12 FCC Rcd 3175, 3176 ¶ 3 (1997).

[677] *Time Warner Entertainment-Advance/Newhouse Partnership and Paragon Communications both d/b/a Time Warner Cable, Petition for Determination of Effective Competition*, Petition for Special Relief ("Wayne Petition"), CSR 4935-E (January 30, 1997), Exhibit F.

[678] *Id.*, Exhibit I; Ameritech Comments at 12.

[679] Time Warner, FCC Form 1240, Part I, Jan. 31, 1995.

203. Following Ameritech's entry to the cable market, Time Warner (with about 5,000 subscribers): (a) lowered the price of its expanded basic services;[680] (b) introduced a subscriber retention program (which gives the subscriber the choice of two free months of cable service or free Cinemax for a year in return for a one-year subscription); (c) added 10 to 11 channels to its expanded basic service; (d) moved two premium channels, the Disney Channel and the sports PASS channel, to expanded basic at no additional charge; and (e) upgraded its plant to a 750 MHz system, with 550 MHz being used for analog and 200 MHz reserved for digital.[681]

204. The incumbent cable operator's petition for determination of effective competition was granted in March 1997. The Commission found that Ameritech's overbuild of Time Warner's system is virtually complete in the City of Wayne and that Ameritech's services reduced Time Warner's subscribership.[682] Further, Ameritech's franchise agreement requires Ameritech to provide numerous public benefits to the City of Wayne, such as free cable service to Wayne City Hall, police and fire stations, public schools, and public libraries.[683]

B. Preliminary Findings

205. The actual case studies detailed above address competition between incumbent cable systems and overbuilders, all of which are using similar wired delivery systems. In the current case studies as well as in the case studies in the last report, incumbent cable operators facing competition from MVPDs using wired delivery appear to be responding: (1) by offering better customer services, new services, and new products; and (2) by offering lower prices or some form of price discounting. MVPD entrants appear to be focusing on similar strategies in their efforts to win customers.[684]

206. In the markets studied, some incumbents increased their service offerings in an attempt to protect or maintain customer bases in the face of entry. Operators added new channels in Berea, Columbus Grove, Fairfield-New Haven, Sterling Heights, and Wayne. Some of the new channels added were previously offered a la carte channels (such as the Disney Channel) and moved onto expanded service tiers at no additional cost. However, in Berea, Fairfield-New Haven, and Thousand Oaks, the channel line-up of the incumbent was equal or larger than that of the entrant. Thus, in contrast to the preliminary finding in the *1996 Report*, the tendency for entrants to enter the market with a larger channel line-up than the incumbent is not as apparent in 1997.

207. There is also some evidence that incumbent cable operators continue to lower prices when competing with LEC and other wired cable overbuilders. Incumbent cable systems in Berea, Fairfield-New Haven, St. Petersburg, Thousand Oaks, and Wayne appear to be offering substantial discounts, between 20 and 50%, on basic or expanded basic services. Incumbents have attempted to limit such price

---

[680] Ameritech Comments at 12.

[681] Wayne Petition at 12-13; Ameritech Comments at 12.

[682] Wayne Order, 12 FCC Rcd at 3179 ¶ 11.

[683] *Id.* at 3176-77 ¶ 4.

[684] *1996 Report*, 12 FCC Rcd at 4461 ¶¶ 229-31.

reductions by discounting only for a limited period of time, to only those customers who can switch to a competing service,[685] or only if additional services are taken.

208. Entrants also appear to be competing on the basis of price. Entrants in Connecticut and Thousand Oaks encouraged subscribers to switch to its services by offering lower prices -- not larger service tiers -- than those offered by incumbents. In addition, some entrants discount their rates further if the subscriber takes additional non-video services. In Connecticut, for example, SNET offered a $30 voucher good toward the purchase of any other service offered by SNET.

209. The incumbent operators in all six cases have already petitioned for relief from current cable rate regulations on the ground that they face effective competition. In Berea, Columbus Grove, Sterling Heights area, Thousand Oaks and Wayne, the incumbents' petitions have been granted. As we stated in the last report, we expect incumbents and entrants to compete differently where these petitions are granted by the Commission.[686] Since the current rate regulations under certain circumstances prohibit cable operators from providing selective rate discounting,[687] deregulated cable operators have a greater ability to provide selective rate discounts to maintain their subscriber base in the market.

210. We will continue to monitor the extent of competition as incumbent operators compete with new cable operators and other MVPDs to gain subscribership. Price discounts, improved services, and new services must be sustained over a longer time period before we can determine whether such consumer benefits are a transitory or permanent reaction to competition. We believe that implementation of the 1996 Act together with technological improvements (e.g., digital technology and enlarged channel capacity) could make new entrants more effective competitors. Such competition in the marketplace is just emerging, however, making it impossible for us to predict the extent to which competition will develop over time and constrain cable systems' exercise of market power. Because the cable industry is generally in the process of adding channels, upgrading facilities, and improving customer service, it remains difficult to determine changes responsive to competition and those taking place on a more general basis.

V. ISSUES RELATING TO FEDERAL LAWS AND REGULATIONS

211. In this section, we discuss a variety of federal laws and regulations that affect competition in the video marketplace, including the Commission's progress to date in its continuing implementation of the 1996 Act. In particular, we describe developments related to over-the-air reception devices, inside wiring, pole attachments, television towers for DTV, program access issues, horizontal ownership issues,

[685] Ameritech claims that the reaction of incumbents to new entry (such as reducing prices and expanding services) is in marked contrast to the incumbent's behavior in adjacent communities not yet served by an entrant, where cable rates continue to rise and subscribers have poor choices. Comments on Consumer Union Petition at 3.

[686] *Id.*

[687] As stated in the Communications Act, sec. 623(d), as amended:

> "A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system."

copyright act issues, MVPD carriage of broadcast signals, public service obligations for DBS, and navigation devices.

A. Over-the-Air Reception Devices

212. Section 207 of the 1996 Act directed the Commission to "promulgate regulations to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services."[688] This provision is intended to provide consumers with access to a broad range of video programming services. The Commission adopted rules that prohibit inappropriate government and nongovernment restrictions on the installation, maintenance or use of reception devices located on property that is within the exclusive use or control of the viewer and in which the viewer has a direct or indirect ownership interest.[689] The Commission sought comment in a pending *Further Notice of Proposed Rulemaking* on how to treat the placement of antennas on property in which the viewer does not have an ownership interest and exclusive use or control -- e.g., rental apartments and MDU common areas -- and on a proposal to allow an association to install a community antenna as an alternative to allowing individual antennas.[690]

213. The over-the-air reception devices ("OTARD") rule[691] applies to satellite dishes (including DBS and other DTH satellite dishes) one meter or smaller in diameter, or dishes of any size located in Alaska;[692] MDS, MMDS and LMDS (i.e., wireless cable) antennas one meter or smaller in diagonal measurement, plus a mast if needed; and television antennas of any size.[693] The rule prohibits governmental and private restrictions that impair the ability of antenna users to install, maintain, or use over-the-air reception devices or to receive acceptable quality signals, except where such restrictions are

[688] 1996 Act, § 207.

[689] *See Preemption of Local Zoning Regulation of Satellite Earth Stations, Restrictions on Over-the-Air Reception Devices: Television Broadcast and Multichannel Multipoint Distribution Service*, IB Docket No. 95-59, CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking ("*OTARD Order*"), 11 FCC Rcd 19276 (1996). Petitions for reconsideration are pending.

[690] *OTARD Order*, 11 FCC Rcd at 19311-315 ¶¶ 59-65.

[691] The Commission currently has two rules, 47 C.F.R. § 25.104 and 47 C.F.R. § 1.4000, that govern the installation and use of reception devices and specify the circumstances under which federal preemption of local zoning ordinances would occur. Section 25.104, which partially implements Section 207 of the 1996 Act, applies to home satellite antennas greater than one meter in diameter and permits certain installation and use restrictions that further a "clearly defined health, safety, or aesthetic objective." Section 1.4000, referenced in the text above as the OTARD Rule, was adopted specifically to implement Section 207. *See OTARD Order*, 11 FCC Rcd at 19277-289 ¶¶ 2-5.

[692] Currently, satellite reception in Alaska requires dishes greater than one meter in diameter.

[693] 47 C.F.R. § 1.4000.

necessary "to accomplish a clearly defined safety objective" or "to preserve an historic district listed or eligible for listing in the National Register of Historic Places . . ."[694]

214. Since the rules became effective on October 14, 1996, the Cable Services Bureau has received 38 Petitions for Declaratory Ruling and three Petitions for Waiver. Thirteen petitions have been resolved informally, and orders have been issued on six others. The Bureau has also facilitated informal resolution of numerous disputes between antenna users and restricting entities before they reached the petition stage. The Bureau frequently achieves informal resolution by informing the regulating entity, which is usually a homeowner's association, about the rule and explaining how the rule would apply in a particular situation. Where necessary, the Bureau consults with both the antenna user and the association to reach a resolution.

215. Of the six orders issued by the Bureau, five involved preemption of homeowner associations' regulations that unduly restricted consumers' ability to install reception devices.[695] One homeowner's association claimed its restrictions were necessary to preserve an historic district and thus permissible under the OTARD rule, but the Bureau found inadequate evidence to support the claim.[696] Another homeowner's association failed to offer sufficient evidence to support its claim that petitioners could receive acceptable quality signals by placing an antenna in their attic.[697] Three other petitions involved regulations that completely prohibited the installation of exterior antennas without justification on either safety or historic preservation grounds,[698] while another concerned regulations that prohibited antenna installation unless the homeowner complied with an unspecified prior approval process related to aesthetic factors.[699] The sixth order preempted a governmental restriction in Meade, Kansas, requiring permits and prior approval for antenna installation and compliance with unspecified setback requirements under penalty of a $500 a day fine.[700]

216. Commenters argue that the rules as presently crafted give local government authorities and homeowners associations many opportunities to block competition.[701] For example, several commenters

---

[694]47 C.F.R. § 1.4000(b).

[695]*In the Matter of Michael J. MacDonald*, CSR 4922-O, DA 97-2189 (released Oct. 14, 1997); *In re Jay Lubliner and Deborah Galvin, Potomac, Maryland*, CSR 4915-O, DA 97-2188 (released Oct. 14, 1997); *In re CS Wireless Systems, Inc. d/b/a OmniVision of San Antonio*, CSR 4947-O, DA 97-2187 (released Oct. 14, 1997); *In re Victor Frankfurt, Vernon Hills, Illinois*, CSR 5024-O, DA 97-2305 (released Oct. 31, 1997); *In re Wireless Broadcasting Systems of Sacramento, Inc.*, CSR 5001-O, DA 97-2506 (released Nov. 28, 1997).

[696]*See In the Matter of Michael J. MacDonald*, CSR 4922-O.

[697]*See In re Jay Lubliner and Deborah Galvin*, CSR 4915-O.

[698]*See In re CS Wireless Systems*, CSR 4947-O; *In re Victor Frankfurt*, CSR 5024-O.

[699]*See In re Wireless Broadcasting Systems of Sacramento, Inc.*, CSR 5001-O.

[700]*In re Star Lambert*, CSR 4913-O, Memorandum Opinion and Order, 12 FCC Rcd 10455 (1997).

[701]*See, e.g.*, BellSouth Comments at 17-18; ICTA Comments at 13-14; NAB Reply Comments at 30-31; OpTel Comments at 4.

contend that the rules as adopted are unfair and not consistent with the intent of Congress because they do not extend to renters and other consumers who do not have exclusive use of areas suitable for antenna installation.[702] BellSouth asserts that the rules do not go far enough to preempt permit or other advance approval requirements, and that they provide an incentive for the adoption of illegal antenna restrictions that have no legitimate public safety objective.[703] These concerns will be considered by the Commission in connection with the pending OTARD reconsideration petitions and the *Further Notice of Proposed Rulemaking*.[704]

217. ICTA and OpTel claim that many jurisdictions have restricted installation and construction of new antennas, limiting the deployment of more widely dispersed and cost- effective competitive video providers,[705] while others have sought to create new fees or taxes for competing MVPDs due to concerns that increased competition will result in a reduction in franchise fees.[706] They recommend that the Commission broaden its federal antenna preemption to include microwave and other antennas used to deliver video programming, and closely scrutinize local fees or taxes imposed on competitive MVPDs.[707] We note, however, that Section 207 authorizes the Commission to preempt local regulations restricting reception devices, not transmission antennas or towers. Moreover, while the imposition of disparate taxes on competitors can have a distorting impact on competition, commenters have not presented probative evidence that such taxes and fees are a widespread occurrence that is adversely affecting competition and warrants Commission action or a recommendation that Congress address this situation.

218. The preemption of antenna placement restrictions contained in Section 207 eliminates some barriers to competition by spectrum-using video distributors. However, in some situations, the elimination of restrictions leaves unclear the question of whether MDU residents within a building can gain access to an acceptable receiving location. This issue will be addressed in the *Further Notice of Proposed Rulemaking*. Depending on the outcome of those proceedings, additional antenna placement rights may be necessary if competition for individual MDU subscribers is to take place on a broader basis.

B. Inside Wiring

219. In previous *Reports*, the Commission noted that strategic behavior by incumbent firms can create impediments to entry and competition by rival service providers.[708] Strategic behavior may be

---

[702]DIRECTV Comments at 10; NAB Reply Comments at 33-34; NRTC Reply Comments at 12-13; SBCA Comments at 12.

[703]BellSouth Comments at 18. BellSouth also claims that the Commission exceeded its legal authority under § 207 by inferring for itself the authority to allow restrictions that impair video reception if such restrictions are designed to promote safety or historical preservation interests. *Id.* at 17-18.

[704]*See* fn. 689 *supra.*

[705]ICTA Comments at 13; OpTel Comments at 4.

[706]ICTA Comments at 13-14; OpTel Comments at 4.

[707]*Id.*

[708]*See, e.g., 1995 Report*, 11 FCC Rcd at 2154-56 ¶¶ 205-9; *1996 Report*, 12 FCC Rcd at 4450-52 ¶¶ 196-200.

designed to raise rivals' costs or decrease their access to customers, and can deter would-be competitors' entry by creating a credible threat that entry would be unprofitable.[709] Various commenters assert that exclusive contracts for MDUs and lack of access to inside wiring impede competition for multichannel video programming services to MDU residents.[710] These commenters advocate moving the MDU demarcation point to the building entry or to the location at which the wire becomes dedicated to serving a specific subscriber unit,[711] prohibiting incumbent cable operator and/or landlord limitation of competitive access,[712] and prohibiting or limiting exclusive MDU service agreements.[713]

220. On October 17, 1997, the Commission released a *Report and Order and Second Further Notice of Proposed Rulemaking* concerning inside wiring, which is designed to facilitate competition among MVPDs serving MDUs.[714] The *Order* establishes procedures for the orderly disposition of MDU wiring (including home run wiring and home wiring) in the event the MDU owner wants to switch its entire building to an alternative service provider, or wants to permit an alternaive provider onto the premises to compete for the right to use inside wiring on a unit by unit basis.[715] The *Order* also allows individual subscribers to install their own home wiring or to add to their service provider's home wiring. The Order adopts no rules relating to exclusive agreements for the provision of multichannel video programming services to MDUs. The *Order*, however, seeks comment concerning the possibility of the Commission's adoption of certain restrictions on such agreements.

221. The rules adopted were limited in scope, applying to MDU home run wiring only where the incumbent provider no longer has a legally enforceable right to remain on the premises. If the Commission had more explicit authority to address wiring transfer and compensation issues, policies could

---

[709]12 FCC Rcd at 4450-1 ¶ 196.

[710]*See, e.g.,* NCCTA Comments at 1; RCN Reply Comments at 9. Cable inside wiring includes the wiring within a subscriber's premises ("cable home wiring") and, in MDUs, other wiring dedicated exclusively to serving a specific subscriber unit ("home run wiring").

[711]Ameritech Comments at 31-32; RCN Reply Comments at 10-11; GTE Reply Comments at 7-8.

[712]Ameritech Comments at 31-32; RCN Comments at 9-11; *See* NCCTA Comments at 1.

[713]*See* Ameritech Comments at 28-30; DIRECTV Comments at 9-11; GTE Reply Comments at 5-9; ICTA Comments at 8; OpTel Comments at 3-5. Some commenters assert that the use of perpetual exclusive contracts by franchised cable operators in MDUs restrains and inhibits competition. *See, e.g.*, GTE Reply Comments at 7; ICTA Comments at 6, 8-11; OpTel Comments at 3-5. GTE, ICTA and OpTel support the use of exclusive service contracts in MDUs, but argue that perpetual exclusive contracts impede competition. These commenters advocate a "fresh look" for perpetual contracts entered into by MVPDs and dominant telecommunications providers. The "fresh look" would allow customers (whether MDU owners or individual subscribers) to renegotiate or cancel such contracts as competition is introduced. GTE Comments at 7; ICTA Comments at 8-11; OpTel Comments at 5. In addition, ICTA recommends that the Commission preclude MDU video service contracts from linking the duration of the contract to that of the cable operator's franchise and all renewals or extensions thereof. ICTA Comments at 6.

[714]*Inside Wiring Order*, fn. 470 *supra. See also* paras. 129-139 *supra.*

[715]The Commission will apply rules regarding disposition of cable home run wiring to all MVPDs. MDU owners may also purchase "loop-through" wiring upon the owner's termination of the incumbent's services to the MDU.

be adopted to further facilitate competition in MDUs, including ongoing building and unit-by-unit competition.

C. Pole Attachments

222. In the *1996 Report*, we noted that Congress had directed the Commission to issue new pole attachment formulas within two years of the effective date of the 1996 Act.[716] The Commission is presently considering, in separate proceedings, issues related to elements of the pole attachment rate formula, the use of current presumptions, the use of gross versus net data, and the implementation of a methodology to ensure just, reasonable and nondiscriminatory rates for pole attachments, conduits, and use of rights of way.[717]

223. In the *Notice*, we sought information that would demonstrate whether the rates charged for pole attachments by exempt cooperatives[718] and governmental entities impede or promote competition, especially in rural areas.[719] All pole attachment rates are subject to negotiation, but the pole rates charged by non-exempt utilities are subject to federal regulation where the parties are unable to resolve a dispute over such charges. Pursuant to a statutory exception, cooperatives' and governmental entities' pole attachment rates are not currently subject to regulation in the event of a dispute.[720]

224. A few commenters contend that the cooperative exemption should be eliminated, arguing that unregulated pole owners have increased pole attachment rates significantly in recent years, often

---

[716] *1996 Report*, 12 FCC Rcd at 4450 ¶ 195. Section 703 of the 1996 Act amended Section 224 of the Communications Act, Regulation of Pole Attachments, 47 U.S.C. § 224.

[717] *See Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Notice of Proposed Rulemaking, 12 FCC Rcd 10527 (1997): seeks comment on the Commission's use of current presumptions, on carrying charge and rate of return elements of the pole attachment formula, on the use of gross versus net data, and on a new conduit methodology; and *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, FCC 97-234, Notice of Proposed Rulemaking (released August 12, 1997): seeks comment on the implementation of a methodology to ensure just, reasonable, and nondiscriminatory maximum pole attachment and conduit rates and on a method to ensure that rates charged for the use of rights of way are just, reasonable and nondiscriminatory.

[718] The statute exempts "any person who is cooperatively organized" from regulation of pole attachments. *See* 47 U.S.C. § 224(a)(1).

[719] *Notice*, 12 FCC Rcd. at 7843-44 ¶ 20. The 1996 Act amended Section 224(a)(4) of the Communications Act to define "pole attachment" as "any attachment by a cable system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." *See* 47 U.S.C. § 224(a)(4). However, poles, ducts, conduits and rights-of-way owned or controlled by any railroad, cooperative, or federal or state entity are not considered utilities under this section. *Notice, id.*

[720] *See* 47 U.S.C. §§ 224(a)(1) and (e)(1).

exceeding the national average.[721] NCTA claims that although cooperative utilities were found to charge the lowest pole rates when the exemption was adopted in 1978, they now often charge the highest rates.[722] Commenters relate several examples of significant pole attachment rate increases where cooperative or municipal entities had announced plans to enter the telecommunications service market.[723] Similarly, both SCBA and NCTA assert that many cooperatives have become DBS retailers, and that this has provided cooperatives with the incentive to obstruct cable competition through unreasonable pole attachment conditions and rates.[724]

225. In contrast, APPA maintains that the few examples of allegedly unreasonable rates offered by commenters represent only a fraction of the pole attachment agreements in existence, and do not justify elimination of the exemption.[725] APPA also contends that it is of no consequence that some cooperatives' pole rates are above the national average since that average is derived from many values above and below it, and may reflect below-cost rates as well.[726] APPA claims that eliminating the exemption that government entities, cooperatives and railroads have from federal pole attachment requirements would be harmful to small electric utilities, which generally lack the resources and databases necessary to comply with the Commission's complex pole attachment requirements.[727] Commenters who support the exemption cite a survey of 525 NRECA members which found that: (a) more than 93% of cooperatives own poles that are jointly used by other utilities; (b) the average rate charged by cooperatives is $6.71 per pole; (c) 76% of cooperatives attach to poles owned by other entities, for which they are charged an average of $9.02 per pole; and (d) 75% of cooperatives do not recover the attaching entity's proportionate share of the full cost of the pole in their rates.[728] NRECA also disputes claims that many cooperatives offer DBS service, noting that there are some 1,000 rural electric cooperatives in the U.S., but less than 10% participate in DBS.[729]

---

[721] *See, e.g.*, NCTA Comments at 40-41; SCBA Comments at 18-21; SCBA Reply Comments at 3.

[722] *See* NCTA Comments at 41-42.

[723] NCTA Comments at 42-44 (cites numerous increases ranging from 38% in Nashville to 565% in North Carolina); US West Comments at 21-23 (cites a proposed doubling of one municipality's pole rates to $10, with that rate increasing to $25 over five years).

[724] *See* NCTA Comments at 41-42; SCBA Comments at 21.

[725] APPA Reply Comments at 2-3.

[726] *Id.* at 4.

[727] APPA Comments at 2; APPA Reply Comments at 2.

[728] *See, e.g.*, NRECA Comments at 2; Minnesota Electric Comments at 2; Montana Electric Comments at 2-3; NRTC Comments at 24. APPA contends that recent cooperative pole rate increases may reflect efforts to begin recovering full pole costs. *See* APPA Reply Comments at 3.

[729] *See* NRECA Comments at 2 and NRECA Reply Comments at 3; *see also* Minnesota Electric Comments at 3; Montana Electric Comments at 2.

226. The pole attachment rate regulation function is one that is shared between the Commission and state and local governments, with state and local governments having priority in those situations where they choose to regulate. The initial congressional decision to exempt cooperatives and government entities appears to have been based, at least in part, on the implicit assumption that these entities were functioning not just as businesses providing utility pole and conduit space but as public representatives performing a regulatory or quasi regulatory function. When these cooperatives and municipal entities are themselves engaged in the provision of communications services a conflict of interest may result such that the rates charged to competitors may no longer be cost based and that competition may accordingly be distorted.[730]

D. Television Towers for DTV

227. The Commission adopted an aggressive implementation schedule for DTV to ensure preservation of a universally available, free local television service and the swift recovery of broadcast spectrum.[731] Digital television may provide a means for broadcast television to become more competitive in the market for delivery of video programming by permitting the use of HDTV or multiplexed services. In order to provide digital television service, broadcasters will need to modify their facilities, including often new transmitters, new digital production facilities and, in some cases, new towers.[732] Of particular concern to broadcasters is the effect of local and state regulations on their ability to upgrade existing towers or to construct new towers in a timely manner.[733] In the *Fifth Report and Order*, we noted that the difficulties in obtaining zoning and other approvals may interfere with a television station licensee's ability to meet construction schedule requirements.[734] We are, however, also sensitive to the important

[730] *See, e.g.*, NCTA Comments at 41-46; SCBA Comments at 21; US West Comments at 21-23

[731] *Fifth Report and Order*, 12 FCC Rcd at 12840-1 ¶ 76. In the *Fifth Report and Order*, we found that an accelerated roll-out of digital television was essential for four reasons. We found that absent a speedy roll-out, other digital television services might achieve levels of penetration that could preclude the success of over-the-air digital television, leaving viewers without a free, universally available digital programming service. Second, we determined that a rapid construction period would promote DTV's competitive strength internationally, spurring the American economy in terms of manufacturing, trade, technological development, international investment, and job growth. Third, we stated that "an aggressive construction schedule helps to offset possible disincentives that any individual broadcaster may have to begin digital transmissions quickly." Finally, we found that a rapid build-out would work to ensure that the recovery of broadcast spectrum occurs as quickly as possible. This will enable the federal government to reallocate some of the recovered spectrum for public safety purposes, and to eventually auction the rest. *Fifth Report and Order*, 12 FCC Rcd at 12842-3 ¶¶ 80-83.

[732] Kyle Pope and Mark Robichaux, *Hype Definition: Waiting for HDTV? Don't Go Dumping Your Old Set Just Yet*, Wall Street Journal, Sept. 12, 1997, at A1.

[733] NAB Reply Comments at 35-37. There are also other logistical and resource concerns that may affect broadcasters' ability to meet the deadline for conversion to DTV, including the number of towers that need to be modified or constructed, the scarcity of construction crews, weather delays and supply shortages. *Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities*, MM Dkt. No. 97-182, Notice of Proposed Rulemaking ("*DTV Tower Notice*"), 12 FCC Rcd 12505, 12505 ¶ 4 (1997).

[734] *Fifth Report and Order*, 12 FCC Rcd at 12810 ¶ 77.

state and local roles in zoning and land use matters and their longstanding interest in the protection and welfare of their citizenry.

228. The Commission has adopted a *DTV Tower Notice* to seek comment on whether any action is necessary in order to achieve a rapid roll-out of DTV.[735] The *DTV Tower Notice* was issued in response to a "Petition for Further Notice of Proposed Rule Making" filed jointly by NAB and the Association for Maximum Service Television ("Petitioners").[736] In addition, the Commission is working with the Local and State Government Advisory Committee as a means of ensuring that municipal views are considered in this proceeding.

E. Program Access Issues

229. The Commission established rules pursuant to the 1992 Cable Act concerning programming arrangements between MVPDs and satellite-delivered program vendors (the "program access" rules).[737] These rules prohibit unfair competition and discriminatory practices by cable operators and certain vertically-integrated programmers[738] that may inhibit competition.[739] In addition, the program access rules prohibit exclusive distribution contracts for satellite cable or broadcast programming between vertically integrated cable operators and programmers, unless the parties can demonstrate to the Commission that the contract is in the public interest.[740]

---

[735] *DTV Tower Notice*, 12 FCC Rcd at 12508 ¶ 11.

[736] This petition was filed in the Commission's digital television proceeding, MM Dkt. No. 87-268. In the *DTV Tower Notice*, the Commission stated that this petition would be treated as one filed pursuant to 47 C.F.R. § 1.401 seeking the institution of a new rule making proceeding. *DTV Tower Notice*, 12 FCC Rcd at 12504 n.1. *See also* NAB Reply Comments at 36-37. The Petitioners propose a rule that would: (a) provide specific time limits for state and local government action in response to requests for approval of the placement, construction or modification of broadcast transmission facilities; (b) remove from local consideration certain types of restrictions on the siting and construction of transmission facilities, including regulations based on the environmental or health effects of radio frequency ("RF") emissions, interference with other telecommunications signals and consumer electronics devices, and tower marking and lighting requirements provided that the facility has been determined by the Commission to be in compliance with applicable federal rules; (c) preempt all state and local land use, building, and similar laws, rules or regulations that impair the ability of licensed broadcasters to place, construct or modify their transmission facilities unless the promulgating authority can demonstrate that the regulation is reasonable in relation to a clearly defined and expressly stated health or safety objective other than the categorical preemptions described above; and (d) provide for expeditious review by the Commission of any denial of a request by a state or local government. *DTV Tower Notice*, 12 FCC Rcd at 12506-7 and 12520-22 ¶¶ 5-9 and Appendix B.

[737] The Commission's program access are set forth at 47 C.F.R. §§ 76.1000-76.1003, and the program carriage rules are set forth at 47 C.F.R. §§ 76.1300-76.1302. *See also* 47 U.S.C. 536(a)(2); 47 U.S.C. § 548.

[738] A vertically-integrated programmer is one that shares ownership interests in common with one or more cable system operators (*See 1996 Report*, 12 FCC Rcd at 4429 n. 398).

[739] *1995 Report*, 11 FCC Rcd at 2155 ¶ 157; *1994 Report*, 9 FCC Rcd at 7520-22 ¶¶ 157-60, 7528-30 ¶¶ 173-78.

[740] 47 C.F.R. § 76.1002(c)(2).

230. As the Commission has consistently noted, exclusive arrangements can be used to deter entry and inhibit competition from other MVPDs in markets for the delivery of multichannel video programming.[741] We have also recognized, however, that exclusive arrangements can produce efficiency benefits for the parties involved, and may increase competition, which can produce lower prices and increased choice for consumers in programming and distribution markets.[742] By targeting and eliminating those vertical restraints that can impair competition in markets for the distribution of multichannel video programming, the Commission's enforcement of its program access rules is designed to contribute to the long-term performance of both distribution markets and programming markets.[743] Indeed, the program access rules have been credited as having been a necessary factor in the development of both the DBS and MMDS industries.[744]

231. In the *1996 Report*, the Commission recognized that improved technology and lower costs are improving the efficiency of terrestrial distribution of programming, particularly over fiber-optic facilities. We noted that, as a result, it appears that it may become possible for a vertically-integrated programmer to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules concerning access to programming.[745] In its comments, BellSouth asserts that Cablevision Systems Corp., which controls the rights to much of the sports programming in the New York City metropolitan area, will soon launch a fiber-based version of its popular SportsChannel New York service in order to avoid its program access obligations to competing DBS and wireless cable operators. BellSouth contends that marketplace developments have outpaced the original scope of the program access rules, which in their original form did not contemplate that programmers would eventually have the capability of delivering their services through fiber rather than through satellite transmission.[746]

232. BellSouth urges the Commission to commence a rulemaking proceeding to either amend its rules or, where necessary, make recommendations to Congress which at a minimum (1) extend the program access rules to all programmers and broadcast television stations, regardless of whether they are vertically integrated or whether they are satellite-delivered, and (2) prohibit cable programming vendors and local broadcast television stations from requiring video distributors to carry any other programming channel as a condition of granting retransmission consent.[747]

---

[741] *E.g.*, *1990 Report*, 5 FCC Rcd at 5021-32 ¶¶ 112-30; *1995 Report*, 11 FCC Rcd at 2135 ¶ 158.

[742] *See, e.g.*, *1990 Cable Report*, 5 FCC Rcd at 5008-11 ¶¶ 82-91, 5031-32 ¶¶ 129-30; *1995 Report*, 11 FCC Rcd at 2135 ¶ 158. *See Memorandum Opinion and Order and Notice of Proposed Rulemaking*, FCC 97-415 (rel. Dec. 18, 1997) at ¶ 4, citing Report of the House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 41 (1992).

[743] *E.g.*, *1995 Report*, 11 FCC Rcd at 2135 ¶ 158.

[744] *E.g.*, Eric Schine, *Digital TV: Advantage, Hughes*, Bus. Week, Mar. 13, 1995, at 14; *The Wireless Cable Industry*, Dillon Read Equity Research, Aug. 22, 1994, at 3.

[745] *1996 Report*, 12 FCC Rcd at 4435 ¶ 154.

[746] BellSouth Comments at 15.

[747] *Id.* at 16.

233. According to BellSouth, as horizontal concentration of the cable industry increases, a very small number of operators will control systems in most, if not all, of the largest markets in the country. According to BellSouth, this means that non-vertically integrated programming services will have unprecedented incentives to maintain exclusive distribution arrangements with large MSOs.[748] BellSouth, in reference to Fox News/fX and MSNBC as "cable exclusive" programming, fully expects this trend to become more pronounced in the wake of recently announced joint ventures between non-vertically integrated programmers (e.g., Fox and Microsoft) and vertically integrated cable operators such as TCI, Time Warner, Cablevision and Comcast.[749]

234. BellSouth states that a possible vehicle for amending the program access rules is the recent Petition for Rulemaking filed by Ameritech New Media, Inc. (RM-9097), in which Ameritech proposes that the Commission: (a) guarantee expedited review by imposing specific time deadlines for resolving program access cases; (b) institute a right of discovery to enable complainants to obtain information necessary to prove Section 628 violations; and (c) institute economic penalties in the form of fines or charges to create an economic disincentive discouraging Section 628 violations.[750] WCAI and DIRECTV have asked the Commission to expand the scope of the Ameritech proceeding to include consideration of the issues raised above by BellSouth.[751] DIRECTV alleges that MVPDs continue to experience difficulties in obtaining access to certain programming, such as sports programming, that is indispensable to their ability to compete with cable operators. DIRECTV requests that the Commission address the potential "loopholes" in its program access rules that enable those rules to be exploited by those MVPDs that wield market power.[752] DIRECTV also suggests that, given that the program access rules will expire in the year 2002, the Commission should recommend to Congress that the rules be extended, and that the changes requested above be incorporated into the statute as necessary.[753] In addition, on September 23, 1997, DIRECTV filed a complaint with the Commission, alleging that Comcast, a major cable television provider in the Philadelphia area, has refused to make Comcast SportsNet, its regional sports network, available to DIRECTV for its subscribers in the Philadelphia area.[754]

235. WCAI asserts that the past year's joint ventures between programmers not traditionally considered to be vertically integrated and highly vertically integrated cable operators strongly suggests that the present definition of "vertical integration" is too narrow. WCAI states that the definition fails to encompass the broad variety of business relationships with the cable industry that clearly threaten the availability of programming to cable's competitors. In this regard, a number of the more notable cable

---

[748] *Id.* at 12.

[749] *Id.* at 13.

[750] Ameritech Petition at 1-2.

[751] *See* WCAI Reply Comments, RM-9097 at 3-4 (filed July 17, 1997); DIRECTV Comments, RM-9097 at 3-4 (filed July 2, 1997).

[752] DIRECTV Comments at 5.

[753] *Id.* at 7.

[754] *See* complaint of DIRECTV, filed Sept. 23, 1997.

programming services introduced over the past year are owned by entities that would not be viewed as vertically integrated under a traditional analysis of that term, e.g., MSNBC (Microsoft and NBC).[755] This is argued to be a particular concern when services, such as NBC or Nickelodeon, promote and advertise services, such as MSNBC or TV Land, that are sold on an exclusive basis and are unavailable to some competitors.[756]

236. Viacom notes that the Commission has determined that there may be circumstances in which exclusivity is appropriate, particularly as it applies to new programming, even where vertical integration exists. It suggests that exclusive agreements are part of the free market system and should only be regulated for specific reasons. Viacom argues that exclusivity agreements benefit both the non-vertically integrated program producers and the cable operators. These agreements can minimize some of the risk which cable operators take when they carry new programming produced by non-vertically integrated program providers. Otherwise, Viacom suggests that competing operators who do not take the risk gain a "free ride" as they do not assume any of the costs and risks by carrying the new, unproven programming. Without exclusivity, cable systems are often less willing to devote the same level of promotional effort and expenditures. Viacom believes that exclusivity benefits program producers in two ways. In the short term, exclusivity agreements enable the independent program producers to secure carriage on cable systems where their programming receives exposure. Because of exclusivity, cable operators will expend enormous efforts to advertise the programming to viewers to ensure its success. In the long run, the agreements provide a future market for new, costly and/or innovative programming.[757] Furthermore, Viacom points out that those who argue for access to particular programming also want the right to refuse to carry packages of programming.[758]

237. The Commission has resolved eight programming access cases since the *1996 Report*. These cases are described in Appendix G. In addition, on December 18, 1997, the Commission released a *Memorandum Opinion and Order and Notice of Proposed Rulemaking* ("*Program Access Notice*") concerning the program access rules.[759] In the *Program Access Notice*, we seek comment on: (a) whether the Commission should guarantee expedited review of program access complaints by imposing specific time deadlines for resolving program access cases; (b) whether the Commission should institute discovery as of right to enable complainants to obtain information necessary to prove program access violations; (c) whether the Commission should impose damages in order to discourage violations of section 628; (d) whether the program access rules apply to previously satellite-delivered programming which is converted to terrestrial delivery with the effect of constituting an "unfair method[ ] of competition or unfair or deceptive act[ ] or practice[ ], the purpose or effect of which is to hinder significantly or to

[755]WCAI Comments at 10.

[756]Statement of Matthew Oristano, Chairman, People's Choice TV, on behalf of the WCAI, at the Dec. 18, 1997 Commission meeting.

[757]Viacom Reply Comments at 4-5.

[758]*Id.* at 9.

[759]*Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Dkt. No. 97-248, RM No. 9097,Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 97-415 (rel. Dec. 18, 1997).

prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.";[760] and (e) whether the program access rules should be amended to provide that any cooperative buying group that maintains adequate financial reserves should not require its members to provide joint and several liability for commitments of the group.

238. On its face, Section 628 does not preclude a programmer from altering its distribution method from satellite-distribution to terrestrial-distribution.[761] In the *Program Access Notice*, we noted that in its comments, DIRECTV seemed to suggest that it contravenes the spirit, if not the letter, of Section 628 if a vertically-integrated programmer moves from satellite-delivered programming to terrestrial-delivered programming for the purpose of evading the program access requirements.[762] Such an action could arguably constitute an "unfair method[ ] of competition or unfair or deceptive act[ ] or practice[ ], the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[763] The *Program Access Notice* seeks comment on appropriate ways to address such situations. It specifically asks commenters to address the statutory basis for any suggested remedial action and whether legislation is needed. It also seeks comment on whether programming that has been moved from satellite to terrestrial delivery can or should be subject to program access requirements based on the effect, rather than the purpose, of the programmer's action.

F. Horizontal Ownership Limits

239. Section 11(c) of the 1992 Cable Act directed the Commission to set limits on the number of cable subscribers that can be reached by an MSO.[764] In October 1993, the Commission adopted rules providing that no MSO could pass more than 30% of the households passed by cable nationwide.[765] The cable systems attributable to an MSO are calculated by reference to the attribution rules that the Commission historically has imposed on broadcasters.[766] The Commission's rules permit an MSO to pass an additional 5% of cable subscribers, where the cable systems passing the additional subscribers are minority controlled.[767] In September 1993, the D.C. District Court held in *Daniels Cablevision, Inc. v.*

---

[760]Communications Act § 628(b), 47 U.S.C. §548(b).

[761]*Program Access Notice* at ¶ 51.

[762]*Id.*

[763]*Id.* Communications Act § 628(b), 47 U.S.C. § 548(b).

[764]Section 11(c) of the 1992 Cable Act added Section 613(f) to the Communications Act, 47 U.S.C. § 533(f).

[765]47 C.F.R. § 503. *See also In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Second Report and Order, 8 FCC Rcd 8565 (1993).

[766]47 C.F.R. §§ 76.501, 76.503(f).

[767]47 C.F.R. § 76.503(b).

United States[768] that Section 11(c) violated the First Amendment. The court stayed further District Court proceedings pending an interlocutory appeal of its judgment but did not enjoin the Commission from adopting and enforcing rules limiting horizontal concentration.[769]

240. The Commission voluntarily stayed the effective date of its rules until final judicial resolution of the *Daniels* decision.[770] In December 1993, the Center for Media Education/Consumer Federation of America filed a Motion to Lift the Stay and a Petition for Reconsideration. Bell Atlantic also filed a separate Petition for Reconsideration. The following month, Time Warner challenged the stayed rules in the D.C. Circuit Court in *Time Warner Entertainment Co., L. P. v. FCC*, No. 94-1035 (D.C. Cir. 1994). In August 1996, the D.C. Circuit Court consolidated the *Daniels* appeal regarding the facial validity of the statute and the *Time Warner* challenge to the Commission's rules, and determined to hold court proceedings in abeyance while the Commission reconsidered its horizontal rules.[771] Most recently, on September 23, 1997, the Consumers Union and Consumer Federation of America submitted a petition to the Commission requesting, among other things, that the Commission lift the stay on its horizontal ownership rules and reevaluate its current horizontal ownership limits.[772]

G. Copyright Act

241. The major copyright issues affecting competition in multichannel video programming distribution involve the compulsory licenses for, respectively, satellite and cable retransmission of broadcast signals.[773] These issues include whether the licenses should continue to exist; the level of license fees; the degree of comparability between the satellite and cable compulsory licenses and fees, including whether the satellite license should allow satellite retransmission of local signals within broadcasters' local markets, which the cable compulsory license allows for cable operators; definition of local and distant broadcast signals for retransmission purposes; the applicability of the cable compulsory license to OVS systems and providers; and whether to extend compulsory licensing to Internet retransmission of broadcast signals. Recently, the Copyright Office issued a report, described below, concerning these and other

---

[768] *Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1, 10 (D.D.C. 1993), *aff'd in part, Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

[769] *Id.* at 12.

[770] *In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Second Report and Order, 8 FCC Rcd at 8567 ¶ 3.

[771] *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 979-80 (D.C. Cir. 1996).

[772] *See* Consumers Union Petition, fn. 11 *supra.*

[773] The Copyright Act, 17 U.S.C § 101 *et seq.*, establishes the rights of owners of programming and other copyrighted works of authors and, in the case of compulsory licensing, allows non-owners to use programs and other works subject to certain payment and other conditions. Administratively, these copyright provisions fall under the jurisdiction of the Library of Congress,

broadcast retransmission issues[774] and the Librarian of Congress issued an *Order*, also described below, concerning royalty rates for satellite retransmission of broadcast signals.

242. Several commenters advocated copyright law changes that would allow satellite carriers to provide broadcast network programming to all consumers, thereby enabling DBS distributors to compete effectively against other MVPDs.[775] SBCA, NRTC, and PrimeTime24 contend that the satellite compulsory license to retransmit broadcast network signals is anticompetitive because the license is limited to retransmission to "unserved households."[776] These commenters claim, among other things, that the current definition of an "unserved household" does not adequately capture all households that cannot receive clear television pictures from over-the-air broadcasts.[777] In addition, NRTC and SBCA advocate a compulsory network broadcast retransmission license which would allow satellite retransmission to all subscribers, with satellite retransmitters compensating local stations.[778] NRTC contends that the inability of satellite carriers to retransmit network signals to "served" households is contrary to the purposes of the 1996 Act and the nation's pro-competitive telecommunication policies.[779] SBCA notes that the satellite compulsory license, embodied in Section 119 of the Copyright Act, is not permanent, while the cable compulsory license to retransmit network broadcast signals is permanent.[780] In addition, Bell Atlantic seeks confirmation that open video systems meet the copyright statute's definition of a cable system, so that OVS operators and programmers may use the cable compulsory copyright license.[781]

243. *Copyright Office.* On August 1, 1997, the Copyright Office released its Retransmission Report concerning copyright licensing of the retransmission of broadcast signals. The Retransmission Report contains several significant recommendations to Congress regarding cable and satellite

---

[774]A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals, United States Copyright Office, August 1, 1997 ("Retransmission Report").

[775]*See* NRTC Comments at 12-17; PrimeTime 24 Comments at 2-7; SBCA Comments at 18-23. These commenters acknowledge that copyright law does not fall within the Commission's jurisdiction. *See, e.g.,* PrimeTime 24 Comments at 2; SBCA Comments at 18.

[776]"Unserved households" are defined as homes that cannot receive a signal of Grade B intensity from a local network station through the use of a conventional rooftop antenna, and have not received the local network affiliate through a cable subscription within the previous 90 days. 17 U.S.C. § 119(d)(10).

[777]*See* NRTC Comments at 17; PrimeTime24 Comments at 4-8; SBCA Comments at 21.

[778]NRTC Comments at 16; SBCA Comments at 23. NRTC also proposes that networks compensate satellite carriers for adding value to the network signal by increasing the audience reach of the networks beyond the area of affiliate exclusivity. NRTC Comments at 17.

[779]*Id.* at 17.

[780]SBCA Comments at 18-19.

[781]Bell Atlantic Comments at 7-8. Bell Atlantic claims that OVS providers would have to negotiate individually with each copyright holder of each program on each broadcast or must carry station included in the programmer's line-up if OVS providers were not able to use the compulsory copyright license, and that this would make the OVS option impracticable.

retransmission of broadcast signals. The Copyright Office recommends equal treatment of multichannel video programming delivery systems (except to the extent that technological differences or differences in regulatory burdens justify different copyright treatment),[782] including equalization of cable and satellite compulsory license fees (except for such fee differences as are justified by regulatory, technological or economic factors),[783] continuation of the satellite compulsory retransmission license for as long as cable operators have a compulsory retransmission license,[784] and inclusion of OVS systems as entities eligible for use of the cable compulsory license;[785] eventual termination of compulsory licensing for retransmission of broadcast signals;[786] adjustment of license fees to reflect fair market value;[787] equalization of independent station and network signal retransmission fees and provision of cable retransmission royalty rights to owners of network programming (as exists for satellite retransmission royalties),[788] simplification of the cable compulsory license rate structure;[789] reduction of the small cable system subsidy;[790] and

[782]Retransmission Report at 34-35 (endorsing "the goal of removing differences between the licenses where possible, so that the compulsory licenses should have the least possible impact on the competitive balance between satellite carriers and cable systems, while, at the same time, retaining differences that are justified by the regulatory and technological contexts of the two industries.")

[783]*Id.* at 60.

[784]*Id.* at 33-35.

[785]*Id.* at 75-77 (suggesting amendment of section 111 to facilitate the eligibility of open video systems for the cable compulsory license); *see id.* at 61-74.

[786]The Copyright Office believes that broadcast retransmission licensing would best be accomplished through negotiations between collectives representing program copyright owners and program users, or other market mechanisms. Retransmission Report at iv, 33. Accordingly, the Office would prefer to see the eventual termination of both the cable and satellite compulsory licenses. *Id.* at iv, 12, 33. The Copyright Office currently recommends the continuation these compulsory licenses, however, because the licenses have become "an integral part of the means of bringing video services to the public, . . . business arrangements and investments have been made in reliance upon them, and . . . at this time, the parties advocating such elimination have not presented a clear path toward terminating the licenses." *Id.* at 33; *see id.* at iv.

[787]The Copyright Office recommends that every five years a Copyright Arbitration Royalty Panel should set cable and satellite per subscriber, per signal retransmission license rates at their respective full fair market values. Retransmission Report at 59-60. *See* Retransmission Report at 59-60 (recommending fair market value standard for cable retransmission fees); Satellite Home Viewer Act of 1994, 17 U.S.C. § 119(c)(3)(D)(1994) (setting forth a fair market value standard for satellite retransmission fees). The Librarian of Congress recently issued an order establishing satellite license rates determined by a CARP pursuant to these criteria. *See* Report of the Panel, Rate Adjustment for the Satellite Carrier Compulsory License, Copyright Office, Library of Congress, Docket No. 96-3 CARP-SRA; 62 Fed. Reg 55746 (1997), and discussion below.

[788]Retransmission Report at 131-34. Owners of copyrights in network programming (as opposed to owners of local programming contained in network affiliate broadcasts) are not eligible to participate in the distribution of cable compulsory license fees, 17 U.S.C. § 111(d)(3), but are eligible to participate in the distribution of satellite compulsory license fees, 17 U.S.C. § 119. *See* Retransmission Report at 7, 132-33.

[789]Retransmission Report at 41-42, 49-59; *see id.* at 36-41.

retention of the minimum retransmission fee applicable to all cable systems.[791] The Copyright Office also recommended postponing, as premature, any action concerning compulsory licensing of Internet retransmission of broadcast signals.[792]

244. The Copyright Office recommends that section 119's compulsory license for satellite retranmission be extended to allow retransmission of all television broadcast station signals, commercial and noncommercial, within each station's local market, defining a commercial station's local market in accordance with the Commission's rules[793] and defining a noncommercial station's local market as all communities wholly or partially within 50 miles of each station's community of license. The Office notes that technological advances may enable satellite carriers to retransmit local affiliates' network signals to subscribers within the stations' respective local markets, thus eliminating the need to import distant network signals.[794]

245. The Copyright Office rejects the concept of defining unserved households by a picture quality standard instead of the current Grade B signal standard as "too subjective, legally insufficient, and administratively unworkable."[795] The Copyright Office also finds the Grade B standard to be "less than precise and cost inefficient when applied to individual household determinations."[796] The Copyright Office notes that future widespread use of over-the-air digital television may allow a clear standard for determining when a household receives a good quality television picture from an over-the-air signal.[797]

246. *Librarian of Congress.* The 1994 amendments to the Copyright Act required satellite compulsory license fees for retransmission of broadcast signals to be set at "fair market value," considering the competitive distribution environment, the economic impact of the fees on copyright owners and

---

[790](...continued)
[790]*Id.* at 42-45.

[791]*Id.* at 133-34. The minimum copyright royalty applies to all systems, including those retransmitting only local signals. 17 U.S.C. § 111(d)(1)(B), (C) and (D).

[792]Retransmission Report at 92-98.

[793]17 U.S.C. § 111(f) (Definition of "local service area of a primary transmitter.") A commercial television station's local market for copyright purposes coincides with its local market defined by the Commission's must carry rules, 47 C.F.R. §§ 76.55(e) and 76.59. Currently, the Commission uses Arbitron's Area of Dominant Influence ("ADI"). Effective January 1, 2000, Nielsen's Designated Market Area ("DMA") definition will apply. Under Section 76.59, these markets may be modified to include or exclude communites as a result of Commission decisions on individual requests.

[794]Retransmission Report at 117-130.

[795]*Id.*

[796]*Id.*

[797]*Id.*

satellite carriers, and the continued availability of retransmissions to the public.[798] On October 27, 1997, the Librarian of Congress issued a final order setting a monthly rate of 27 cents per subscriber for satellite retansmission of distant signals.[799] This is an increase of 21 cents, from 6 cents per subscriber, for distant network signals and an increase of 9.5 cents, from 17.5 cents per subscriber, for distant superstation signals.[800] The Librarian's order also set a rate of zero for retransmission of local superstation signals and for local network signals retransmitted to unserved households.[801] These rates are to become effective January 1, 1998.[802]

247. DBS operators' current lack of local broadcast programming impairs DBS services' competitiveness with cable service. A consideration of satellite services' carriage of local or other network programming would include a balance of the possibility of private negotiation for program rights, the scope of any compulsory satellite license or other copyright limitations, the scope of any must carry or other carriage obligations, and the extent of statutory parity between cable and DBS. In considering possible changes in copyright, existing differences between the copyright treatment of cable retransmissions and of satellite retransmissions should be removed where possible so that the compulsory licenses do not affect the competitive balance between the satellite carrier and cable industries.

H. MVPD Carriage of Broadcast Signals

248. The mandatory carriage or "must carry" provisions of the Communications Act and Commission's rules affect the mix of programming offered by cable and OVS operators as those entities are obligated to carry certain qualified local broadcast stations.[803] Pursuant to the Communications Act,

---

[798]Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, 103 Stat. 3477 (1994) (codified, in relevant part, as 17 U.S.C. § 119(c)(3)(D) (1994)).

[799]Order of the Librarian, October 23, 1997, 62 Fed. Reg. 55742, 55759 (1997) (rates to be codified at 37 C.F.R § 258.3). The Librarian's Order accepts the rate recommendations of a Copyright Arbitration Royalty Panel ("CARP") convened to propose new rates for retransmissions under section 119 of the Satellite Home Viewer Act, 17 U.S.C. § 119. *See* 62 Fed. Reg. 55744 *et seq.*

[800]*See id.* at 55743-44; 37 CFR § 258.3 (stating rates commencing May 1, 1992, to include, in addition to the 6 cent and 17.5 cent rates noted in the text, a rate of "14 cents per subscriber per month for superstations whose signals are syndex-proof, as defined in § 258.2").

[801]Order of the Librarian, October 23, 1997, 62 Fed. Reg. 55742, 55759 (1997) (rates to be codified at 37 C.F.R § 258.3). The royalty rates for cable compulsory license retransmission of distant signals are set in accordance with a complicated and technical formula (except rates paid by smaller cable systems, which are set at a flat rate or at a percentage of gross receipts from broadcast signals, but which apply to a small minority of cable compulsory license payments). SBCA presented testimony to the CARP indicating that cable operators pay section 111 retransmission royalties of 9.8 cents per subscriber per month for superstation signals and 2.45 cents per subscriber per month for broadcast network signals. *Id.* at 55746.

[802]*Id.* at 55759.

[803]Sections 614 and 615 concerning the must carry rights of commercial and noncommercial television stations, respectively, and Section 325, which provides for retransmission consent, were added by the 1992 Cable Act. The (continued...)

cable and OVS operators have an obligation to set aside a specified number of channels, based on their total channel capacity for the carriage of local broadcast signals.[804] Under these statutory provisions and the Commission's rules, commercial broadcast television stations may elect whether they will be carried by local cable television systems or open video systems under the must carry or retransmission consent rules.[805] A station electing must-carry rights is entitled to insist on cable carriage in its local market area, which the Commission currently defines in terms of Arbitron's areas of dominant influence.[806] Under retransmission consent, the station and the cable or OVS operator negotiate a carriage arrangement and the station is permitted to receive compensation or other consideration in return for carriage. Broadcast stations are required to make this election every three years.[807] Noncommercial educational broadcast television stations are entitled to request must carry status if they are licensed to a community within 50 miles of the cable system headend or they place a Grade B contour over the system's principal headend.[808] They do not have the right to elect retransmission consent.

249. The Cable Services Bureau has acted on 452 must carry complaints since the passage of the 1992 Cable Act. Of these cases, 245 complaints were granted and 207 were either dismissed or denied. The Bureau also has acted on 206 market modification requests since the passage of the 1992 Cable Act.[809] Of these cases, 145 requests were granted and 61 requests were either dismissed or denied.

250. As part of the must carry provisions of the 1992 Cable Act, Congress directed the Commission to initiate a proceeding at the time that we prescribe modified standards for advanced television, now referred to as digital television ("DTV"). This section required the Commission "to

---

[803](...continued)
1996 Act extended these provisions to encompass OVS as well as cable. On March 31, 1997, the Supreme Court upheld the must carry provisions of the 1992 Cable Act. *Turner Broadcasting v. FCC*, 117 S.Ct. 1174 (1997). In its decision, the Court emphasized that preserving the benefits of free, over-the-air broadcast television and promoting the widespread dissemination of information from a multiplicity of sources were important governmental interests.

[804]47 U.S.C. § 534(a), (b)(1), 47 C.F.R § 76.56(b) (obligations to carry local commercial stations); 47 U.S.C. § 535(a), (b); 47 C.F.R. § 76.56(a) (obligations to carry qualified noncommercial stations).

[805]47 U.S.C. § 325(b)(3)(B); 47 C.F.R. § 76.64(f).

[806]47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.55(e). Beginning in 2000, television markets will be based on A.C. Nielsen's Designated Market Areas ("DMAs"). *See Definition of Markets for Purposes of the Cable Television Mandatory Television Broadcast Signal Carriage Rules, Implementation of Section 301(d) of the Telecommunications Act of 1996, Market Determinations*, CS Dkt. No. 95-178, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 6201, 6220-4 ¶¶ 39-48 (1996). The 1992 Cable Act also provides that the Commission may modify television markets for must carry purposes upon request. 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.59.

[807]47 U.S.C. § 325(b)(3)(B); 47 C.F.R. § 76.64(f). The next election must be made by October 1, 1999, and will become effective on January 1, 2000.

[808]47 U.S.C. § 535(l); 47 C.F.R. § 76.55(b).

[809]Under the must-carry provisions of the Communications Act, upon written request, the Commission may modify television markets to include or exclude communities from the television market of a particular television station. 47 U.S.C. § 534(h)(1)(C); 47 C.F.R. § 76.59.